88-747

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CORPORATION,

Petitioner,

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondent,

and

HITACHI METALS, LTD., ET AL., VACUUMSCHMELZE GmbH, NIPPON STEEL CORPORATION, ET AL., and SIEMENS CAPITAL CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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OCTOBER 31, 1988

QUESTIONS PRESENTED FOR REVIEW

On the ground that petitioner Allied Corporation ("Allied") had abandoned the issue by failing to raise it in a related 1984 proceeding, the Court of Appeals for the Federal Circuit ("CAFC") denied Allied its request for judicial review of a threshold, substantive issue decided adversely to Allied in a 1987 United States International Trade Commission ("ITC") determination.

The questions presented are:

1. Whether the CAFC's denial of appellate review erroneously construed the rules of the ITC and the federal right to judicial review of administrative determinations, especially in light of conflicting rulings of other Circuit Courts that it is proper to consider an issue raised on appeal by one party if the issue had been raised before the administrative agency by another party and the agency has had full opportunity to review the issue.

2. Whether the CAFC's denial of Allied's right to appellate review violates the Due Process clause of the Fifth Amendment and is manifestly unjust.

STATEMENT PURSUANT TO RULE 28.1

Allied Corporation was complainant below. Allied Corporation was a subsidiary of Allied-Signal Inc. On September 30, 1987, Allied Corporation was merged into Allied-Signal Inc.

Allied-Signal Inc. has no parent company. Allied-Signal Inc.'s subsidiaries (except wholly owned subsidiaries) and affiliates are:

Allied-General Nuclear Services
ACE, Limited
Allied Holdings (UK) Limited
Bendix HVCG Europe Limited
Ferranti-Bendix Power Generation Limited
Jurid Werke, GmbH
Ingold Electrodes, Inc.
Enscor Inc.
Sonic Oil Separation, Ltd.
Allied Automotive Ltda.
Bendix France, S.A.
Amoricaine de Fonderia-Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Electronics, S.A.
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.A.
Dipra Ricambi, S.p.A.
Bendix Portuguesa Sociedede de Equipamentos Automoveid, Ltda.
Bronzavia Air Equipment, S.A.
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.
Freudenberg, S.A.
Iminor, S.A.
Societe Civile Immobiliere Prieur & Cie
La Decoration Moderne, S.A.
Sifra Industries, S.A.
Societe Civile Immobiliere due 60 Av. De La Grandee Armee
TENSA, S.A.

Transpar Iberica, S.A.
Bendix Italia, S.p.A.
Bendix Altechna Freni, S.p.A.
Bendix Mexicana, S.A. de C.V.
Bendix Pemsa Cinturones de Seguridad, S.A. de C.V.
FIAAM, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Turbo Services SNC
Sistemas Bendix de Seguridad S.A. de C.V.
Allied-Signal Flight Systems Company
Kalyani Brakes Limited
Bendix Electronics Korean, Limited
Bendix Electronic Service Corporation
de Espana, S.A.
Bendix Espana, S.A.
Bendix-Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Superannuation Pty., Ltd.
Bunker Ramo Electronic Data Systems S.A.
Chico Corporation
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
Garrett Comtronics Licensing Corp.
Globe Auto Electricals, Ltd.
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Turbine Engine Corporation
Jidosha Kiki Co., Ltd.
Kanto Seiatsu Kogyo Co., Ltd.
Tokyo Chuzsho
Leaseway All-Services, Inc.
Manbritt Industries, Inc.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Normalair Garrett (Holdings) Ltd.
Dynamic Turbocharger Services Pty., Ltd. Queensland
Dynamic Turbocharger Services Pty., Ltd. Victoria
Asia Pacific Resin Corporation

Doosan Electro-Materials Co., Ltd.
Financiere Allied-Signal S.A.
Nittobo-Norplex/Oak Inc.
Norplex/Oak India Ltd.
Oak Mitsui Inc.
Bendix Electronics, S.A.
Prestolite of India Ltd.
Quimobasicos, S.A.
Propelentes Mexicanos, S.A.
Sifra Industrie, S.A.
Societe Anonyme des Usines Chausson [SECAN]
Societe Wheelabrator-Allevard S.A.
Sofratype, S.A.
Synektron Corporation
Union Texas Petroleum Holdings, Inc.
UOP
Nikki-Universal Co., Ltd.
UM Holdings B.V.
Serind S.p.A.
UMMS Caribbean N.V.
Ataisa S.a.c.i.
Tecpro Industrial Chemicals Ltd.
UOP Management Services (Saudi Arabia) Limited

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Allied Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for The Federal Circuit is reported at 850 F.2d 1573 and is reprinted in the Appendix to this petition commencing at page A-1.[1] The August 25, 1988 Order modifying that opinion appears at A-22.

[1] "A" citations are to pages of the Appendix to this petition. "CA" and "CC" citations are to the Appendix in the CAFC. "CC" citations are to the "confidential" portion of the CAFC Appendix.

Also reprinted in the Appendix to this petition are relevant excerpts from the "public versions" of the following ITC opinions and findings: the ITC's May 28, 1987 Determination, the ALJ's August 14, 1986 Opinion On Remand, the ALJ's March 3, 1986 Initial Advisory Opinion, the ALJ's May 14, 1984 Initial Determination, and the ALJ's May 14, 1984 Findings of Fact.

JURISDICTION

The CAFC entered its judgment on June 29, 1988. Allied's petition for rehearing was denied by the CAFC on August 1, 1988. The CAFC revised its opinion on August 25, 1988. This Court has jurisdiction to review the judgment of the CAFC under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND ITC REGULATIONS

U.S. Constitution amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

5 U.S.C. § 702:

"Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground. . . ."

19 U.S.C. § 1337(c):

"Determinations; review

"The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not

there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of Title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5. . . ."

19 C.F.R. § 210.54(a)(1),(2):

"Petition for review.

"(a) *The petition and responses.* (1) Any party to an investigation may request a review by the Commission of an initial determination by filing with the Secretary a petition for review. . . . A petition for review shall:

"(i) Identify the party seeking review;

"(ii) Specify the issues upon which review of the initial determination is sought:

"(A) A finding or conclusion of material fact is clearly erroneous;

"(B) A legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

"(C) The determination is one affecting Commission policy.

"(iii) Set forth a concise statement of the facts material to the consideration of the stated issues; and

"(iv) Present a concise argument setting forth the reasons why review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy.

"(2) Any issue not raised in the petition for review filed pursuant to this rule will be deemed to have been abandoned and may be disregarded by the Commission in reviewing an initial determination."

STATEMENT OF THE CASE

The CAFC has denied Allied appellate review of a threshold, substantive 1987 determination by the ITC—on the ground that Allied had abandoned the issue in question in a prior 1984 ITC determination. The CAFC decision misconstrues the applicable ITC rules and the federal right of judicial review. The CAFC decision conflicts with decisions of the Courts of Appeals in other Circuits. The CAFC decision violates due process, is manifestly unjust and will have a substantial, and unwarranted, adverse impact on all parties to administrative proceedings in the ITC.

The CAFC denied Allied appellate review of a 1987 ITC construction of the claims of Allied's U.S. Patent 4,221,257 on the concededly important process of making amorphous metal strip. The proper construction of the Allied process patent claims is a threshold legal issue on which turn the issues of patent validity and patent infringement.

This Court need not determine the proper construction of the process patent claims. The Court need only determine whether Allied was improperly deprived of its day in the CAFC on that issue.

The 1987 ITC claim construction was the *fourth* reconstruction of the Allied patent claims by the ALJ and the ITC. It was the culmination of four ITC rulings from May 1984 through June 1987. Each of these four claim constructions differed from the others.

The first ALJ construction was adopted by the ITC, in 1984, without review—notwithstanding that respondents had expressly petitioned for such review of the ALJ's claim construction, issue was squarely joined, and the full Commission

had ample opportunity in 1984 to review the issue. Thereafter, in 1986, the ALJ twice reconstrued the claims, and in 1987, the full Commission retailored them still further.

Allied appealed to the CAFC from the 1987 ITC determination and modified exclusion order pursuant to 28 U.S.C. § 1295(a)(6) (A-10, 16). First under the procedural cloak of intentional waiver, and then—after it revised its opinion—under the procedural guise of abandonment, the CAFC denied Allied appellate review of this relentless revision of Allied's process patent.

In 1984, the ALJ issued an Initial Determination ("ID") in which the Allied patent claims were construed (A-48, 64). Based on the 1984 claim construction, the ALJ found that all respondents infringed (CA41, 46, 50; CC41, 46, 49).

Respondents jointly petitioned the ITC to review the 1984 ID claim construction. Respondents asserted that the ALJ erred in construing Allied's patent claims (e.g. CC10111, 10112, 10113). This was the principal issue raised under respondents' "Points of Error in the Initial Determination" (CC10111). In reply, Allied expressly challenged respondents' 1984 joint petition (CC10128A-30, 10131).

Thus, issue was plainly and expressly joined before the ITC in 1984 as to claim construction. The issue of claim construction, which the CAFC found in 1987 to have been waived or abandoned by Allied in 1984, was in fact squarely before the ITC in 1984. The ITC had full opportunity to consider that issue thoroughly in 1984.

The ITC declined respondents' request to review the 1984 ID, and therefore, did not address the contested issue of claim construction (CA207). Consistent with the ALJ's 1984 ID, the ITC issued an unqualified General Exclusion Order (CA755-59). Thus, Allied prevailed in 1984. Allied could not have appealed from the 1984 ITC determination or the 1984 General Exclusion Order because Allied was not adversely affected by either. *Allied Corp.* v. *United States Intern. Trade Comm'n,* 782 F.2d 982, 983 (Fed.Cir. 1986).

In contrast, respondents could have appealed from the 1984 ITC determination and the 1984 General Exclusion Order. They did not. Rather, two respondents, Hitachi Metals, Ltd., et al. ("Hitachi") and Vacuumschmelze GmbH ("Vac"), modified their competing processes, and in 1985, returned to the ITC for a ruling that their modified processes did not infringe.

In her March 3, 1986 Initial Advisory Opinion (A-37-39), the ALJ revised Allied's patent claims a second time and found that respondents modified processes did not infringe. In March 1986, Allied petitioned for review by the ITC, asserting (1) error in the ALJ's March 1986 claim construction and (2) fatal inconsistencies between the ALJ's March 1986 construction and the ITC's 1984 construction (e.g., CC10143). On remand from the ITC, the ALJ in August 1986 revised Allied's patent claims a third time (A-36).

After prohibiting any additional petitions, briefs, or other submissions directed to the ALJ's August 1986 opinion (CA299), the ITC issued its May 1987 determination (A-23-25; CA365-400; CC393-428). In June 1987, the ITC ruled that a modified exclusion order should issue (CA401-428).

In its May 1987 determination, the ITC endorsed a fourth construction of Allied's patent claims (A-35). Based on this new 1987 claim construction, the ITC found that respondents' modified processes did not infringe (CA380-84, CC408-12).

On appeal, the CAFC denied Allied appellate review of the claim construction issue on the ground that Allied had knowingly "waived"[2] Allied's right of review of the *1984* claim construction by failing to raise that issue in *Allied's* petition for review of the 1984 ID (A-16)—notwithstanding that (1) the 1984 issue had been expressly raised and extensively discussed

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[2] Later, and without any elaboration, the CAFC changed its "waiver" ground to "abandonment" (A-22). We are left to speculate whether the CAFC was attempting to reinforce its refusal with the "abandoned" language of ITC Rule 210.54(a)(2), or was attempting to answer Allied's contention in its petition for rehearing that the CAFC's *de novo* fact finding of knowing waiver was inappropriate at the appellate level. The CAFC's semantic distinction is of no substantive significance on either score.

by respondents in their joint petition, and contested by Allied, before the ITC in 1984, *and* (2) Allied was seeking appellate review of the *1987* ITC claim construction.

The CAFC denied Allied's petition for rehearing (except for the August 25 revision). This petition followed.

ARGUMENT

A. The Court Of Appeals For The Federal Circuit Has Misconstrued The Administrative Exhaustion Requirement Of 19 C.F.R. § 210.54, Denied Petitioner's Federal Right Of Appeal, And Put Itself In Conflict With Other Circuits

The CAFC denied Allied judicial review of the merits of the patent claim construction issue on the authority of 19 C.F.R. § 210.54(a)(2).

The clear purpose of Section 210.54(a)(2) is to assure that the ITC is afforded timely opportunity to review any issue that is objected to by a party and may subsequently be the subject of appeal to the CAFC. The filing of a petition in the ITC for review by any party to an ITC proceeding is sufficient to accomplish this purpose.[3]

Here the full Commission was afforded such opportunity at every stage of the proceeding. When respondents petitioned for review of the ALJ's 1984 construction of Allied's patent claims and Allied opposed the petition, issue was fully joined before the ITC. It would have served no purpose for Allied to have filed a separate petition for review of a 1984 ruling that Allied had no reason to challenge. Allied's failure to file such a petition in 1984 should not preclude Allied from obtaining judicial review of the 1987 patent claim construction issue when that issue was embodied in the 1987 modified exclusion order that was adverse to Allied.

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[3] The language of Section 210.54(a)(2) does not suggest that, where one party has already petitioned for ITC review of a factual finding or legal conclusion, the opposing party must likewise petition for review or be deemed to have abandoned the issue.

The CAFC's holding that Section 210.54(a)(2) bars judicial review of a 1987 issue that Allied did not itself raise at the administrative level in 1984 is inconsistent with the holdings of other federal Courts of Appeals. These courts have frequently recognized that, so long as an agency has been alerted to an issue and has had an opportunity to consider it, it is immaterial that the person seeking review of the agency's ruling is not the one who initially raised the issue.

In *Safir* v. *Kreps,* 551 F.2d 447, 452 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 820 (1977), the court acknowledged the common law principle that litigants are "not free to raise points [for judicial review] without regard to whether they were argued at some stage of the administrative process." The court went on to emphasize the "narrow" scope of the doctrine requiring exhaustion of administrative remedies, observing that "[s]o long as the appellant *or some other party* has put an objection on the record, the obligation to exhaust is discharged." *Id.* (Emphasis added). *Also, Center for Auto Safety* v. *Thomas,* 806 F.2d 1071, 1076 (D.C. Cir. 1986), *vacated* 810 F.2d 302 (D.C. Cir. 1987) (per curiam) (en banc), *reinstated* 847 F.2d 843 (D.C. Cir. 1988) (per curiam) (en banc). ("This court has often entertained challenges by litigants who failed to participate in the administrative proceeding, about issues that had in fact been considered there"); *Natural Resources Defense Council* v. *U.S.E.P.A.,* 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue. . . . Thus, courts have waived exhaustion if the agency 'has had an opportunity to consider the identical issues [presented to the court]. . . but which were raised by other parties, . . .' ").

The Sixth Circuit has likewise recognized that a litigant may obtain judicial review of issues that were raised by others at the agency level. In *Buckeye Cablevision, Inc.* v. *United States,* 438 F.2d 948 (6 Cir. 1971), the court rejected the Federal Communications Commission's claim that the appel-

lant had failed to satisfy the exhaustion requirement of the Communications Act, 47 U.S.C. §405. The court observed that "[t]he Commission has had an opportunity to consider the identical issues in this case but which were raised by other parties . . . and it was not necessary for Buckeye to raise them again before the Commission." *Id.*, at 951. *Also, Local 512, Warehouse & Office Workers'* v. *N.L.R.B.*, 795 F.2d 705, 714 (9 Cir. 1986) (observing in *dictum* that "[o]nce an issue is raised before the NLRB, another party may litigate the issue on appeal").

The rulings of these cases simply reflect the standard and accepted fact of the right to appeal to a federal court from a decision of an administrative agency. Any party aggrieved by a decision of a federal administrative agency may seek judicial review with respect to issues raised and dealt with by the agency. This principle is codified in the Administrative Procedure Act and the statutory provisions applicable to ITC proceedings. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"); 19 U.S.C. § 1337(c) ("[a]ny person adversely affected by a final determination of the [International Trade] Commission" in proceedings such as this one may appeal to the CAFC in accordance with the Administrative Procedure Act). No magic words are necessary to raise or preserve the right to appeal with respect to any issue fully and fairly presented below. No talismanic formulas need be followed.

These authorities demonstrate that Allied has been deprived of its fundamental right of judicial review. This Court should grant certiorari to correct the error of the court below, to articulate clearly the general standard governing the right of appeal from an administative agency, and to afford Allied its right of appeal.

B. The Court Of Appeals Deprived Allied Of Its Right To Be Heard "At A Meaningful Time And In A Meaningful Manner" By Holding That Allied Should Have Raised The Patent Claim Construction Issue In 1984.

The CAFC held that Allied, by failing to challenge the ALJ's construction of Allied's patent claims in 1984, forfeited any opportunity to obtain judicial review of claim construction. But it is the 1987—not the 1984—claim construction that was the subject of Allied's appeal. It was only after respondents returned to the ITC in 1985, and the ITC found in 1987 that respondents' revised processes were noninfringing, that Allied had any cause to seek judicial review of the claim construction issue. Up to that point in 1987, Allied had done all that it could and should have done to preserve its right to judicial review.

This Court has repeatedly recognized that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Clearly, 1984 was not a "meaningful time" for Allied's current objections to the ITC's 1987 claim construction to be heard. Allied could only have speculated in 1984 as to whether the 1984 claim construction, or a subsequent revision of it, might pose problems in light of future modification of respondents' processes. The law does not demand such clairvoyance on the part of litigants.

In *Mathews* v. *Eldridge*, the Court set forth three factors that must be considered in determining whether a given procedure comports with due process, 424 U.S. at 335:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Here, the interest of Allied and of other parties seeking to exclude foreign goods alleged to infringe U.S. patents is substantial. There is a significant risk that such parties will be deprived of this interest if, as the CAFC has held here, they cannot obtain judicial review of core issues in administrative rulings because another party raised, but they themselves did not raise, the issues in the agency. Fundamental due process rights are cast aside when a litigant such as Allied is denied the right to judicial review of an adverse administrative agency decision because it did not raise a speculative challenge at a premature stage of the proceeding, but rather joined issue after respondents first raised it. In the place of due process, if the CAFC ruling is allowed to stand, parties will be obliged to burden agencies and courts with premature and speculative petitions and appeals.

The CAFC has deprived Allied of its due process right to be heard "at a meaningful time and in a meaningful manner" by refusing to review the merits of the 1987 patent claim construction. The Court should grant certiorari to clarify the due process rights of parties such as Allied who seek judicial review of protracted administrative proceedings, and specifically, to afford Allied the benefit of its due process right.

CONCLUSION

For the foregoing reasons, writ of certiorari should be granted.

Respectfully submitted,

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October 31, 1988